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## 6.1 Records

### 6.1.1 State and Local Coordination; Sources of Law

Access to voter registration and election records is increasingly litigious and controversial. State and local coordination is essential to assure compliance with federal and state laws protecting privacy on the one hand, and providing access on the other. Localities vary in the extent to which local government counsel is available to assist with responding to requests for records. To the extent possible, consultation with local government counsel is recommended after developing a draft response with assistance from SBE to assure consistency.

The statutes governing access to voter registration and election records are complex and scattered. An index at the end of this chapter summarizes these provisions with guidelines for responses to requests under the National Voter Registration Act (NVRA). Other important sources of law include:

1. The Help America Vote Act;
2. The Uniformed and Overseas Citizens Absentee Voting Act as amended by the Military and Overseas Voters Empowerment Act;
3. Virginia election law in Title 24.2.;
4. The Virginia Freedom of Information Act (VFOIA) discussed in this Chapter and Chapter 26;
5. The Virginia Government Data Collection and Dissemination Practices Act;
6. Virginia criminal laws pertaining to identity theft and breaches of personal information security (e.g., Va. Code §§ 18.2-186.3, 18.2-186.6).

Access to federal government records is controlled by the [Federal Freedom of Information Act](#).<sup>1</sup>

Protecting voter privacy and preventing identity theft require strict compliance with statutory restrictions. The United States Court of Appeals for the Fourth Circuit has ruled that registering to vote cannot be conditioned on providing a social security number shared with undisclosed third parties. See, [Greidinger v. Davis, 988 F.2d 1344 \(4th Cir. Va. 1993\)](#). The Code of Virginia strictly prohibits under felony penalty any unauthorized disclosure of all or any part of the social security number on any voter registration or election-related document. [§§ 24.2-407.1, 24.2-1002.01](#). Further, no list or record provided for public inspection may contain the day and month of birth of an individual. [§§ 24.2-404, 24.2-444, 24.2-706](#).<sup>2</sup>

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<sup>1</sup> The federal FOIA does not apply to state and local governments, regardless of receipt of federal funding. See [US DOJ website](#).

<sup>2</sup> Virginia defines registration records as follows:

"Registration records" means all official records concerning the registration of qualified voters and shall include all records, lists, applications, and files, whether maintained in books, on cards, on automated data bases, or by any other legally permitted record-keeping method. [§ 24.2-101](#)

Recent federal litigation has interpreted the National Voter Registration Act (NVRA) to preempt legislation Virginia enacted in 2007 to protect voter privacy by limiting voter registration applications available for inspection in the general registrar's office to lists of registered voters and persons denied registration.<sup>3</sup> The federal ruling includes registration applications submitted on or after July 20, 2011, within records concerning list maintenance that must be available for public inspection and copying for two years under the NVRA.

Virginia law and the consent decree require excluding the social security number and the residence addresses of protected voters from applications provided for public inspection under NVRA. The date of birth may not be excluded when providing an application for inspection under NVRA. Protected voters must apply for protected status and provide a United States post office box address within Virginia for use on voter lists. The statutory categories of protected voters include law enforcement officers and others described in [§ 24.2-418](#) or a federal law requiring similar protection.

Section [24.2-444](#)(C) details information that must be excluded from the public *lists* available in general registrar's offices:

C. No list provided by the State Board under subsection A nor any record made available for public inspection under subsection B shall contain any of the following information: (i) an individual's social security number, or any part thereof; (ii) the residence address of an individual who has furnished a post office box address in lieu of his residence address as authorized by [§ 24.2-418](#); (iii) the declination by an individual to register to vote and related records; or (iv) the identity of a voter registration agency through which a particular voter is registered. No voter registration records other than the lists provided by the State Board under subsection A and the records made available under subsection B shall be open to public inspection. [§ 24.2-444](#).

### **6.1.2 Definition of a “Public Record”**

It is important to recognize that federal and state laws affect the definition of “public record” and the definitions may differ for different purposes. A record available for one purpose may not be available for another. A good example is voter registration applications. Federal courts have interpreted the National Voter Registration Act (NVRA) to make available for public inspection voter registration applications received after July 20, 2011, with social security number and protected voter residence address redacted.<sup>4</sup> Voter registration applications received before that date are not available to anyone other than the voter or authorized law enforcement. [Va. Code §24.2-444\(C\)](#).

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<sup>3</sup> *Project Vote v. Long*, Civil Action No. 2:10-cv-75 (E.D.Va. Jan. 30, 2013) ([consent decree](#)).

<sup>4</sup> *Project Vote v. Long*, Civil Action No. 2:10-cv-75 (E.D.Va. Jan. 30, 2013) ([consent decree](#)).

Virginia's Freedom of Information Act (FOIA) defines public records broadly to include all records a public body or officer creates, owns, or possesses in the course of their appointment, employment, or public duties. [§ 2.2-3701](#). Public records do not include any personal materials incidental to the job. 2011 legislation clarifies that "records that are not prepared for or used in the transaction of public business are not public records." [§ 2.2-3701](#). Records no longer possessed are not included. FOIA generally does not require creating a record that does not exist at the time of the request. [§ 2.2-3704](#). However, the locality responsible for responding may offer to create a summary or extract of records if that is the easiest, quickest and least costly way to respond. . FOIA encourages agreement as much as possible.

FOIA deals with records, not information, but that can be a fine distinction. An easy test is whether the FOIA request can be satisfied by delivery of an existing document or record.

Many FOIA requests that look intimidating on their face can be narrowed to a reasonable volume by working with the requestor to determine what the requestor really wants, and letting him/her know what is available that meets the need. The requestor may think that someone can "push a button" and produce a single page with everything requested and will actually be overwhelmed by receiving an enormous stack of copies and a bill to match.

FOIA is largely a matter of *customer service*, i.e., good communication. Most requestors won't know what report or document to request. They have an idea of what they want to find. Saying, "We don't have it" when something else is available that will meet the requestor's identified needs is bad customer service, poor public relations, and usually results in extra work.

### **6.1.3 Title 24.2 Controls Election and Registration Records**

Election law controls access to voter registration and election records. FOIA applies only if election law is silent. [§ 2.2-3703](#). For example, lists of registered voters are not available under FOIA because §§ 24.2-405 and 24.2-444 governs access to these records.

Even if election law is silent, FOIA may provide other exceptions or exemptions. For example, [§ 2.2-3705.1](#) (10) allows withholding personal information as defined in [§ 2.2-3801](#). [2007 Op. Va. Att'y Gen. 027](#).

Determining whether a particular record is addressed by election law or exempt under FOIA may require consulting legal counsel. Once it is determined that no election law or FOIA exemption applies, the records are open to inspection and copying. Reasonable costs are allowed, including time required to redact protected information.

#### **6.1.4 Email VFOIA Implications**

To the extent election law is silent, electronic records, including e-mails, are covered by VFOIA. The Virginia Freedom of Information Advisory Council has published a useful guide called [\*E-Mail: Use, Access & Retention\*](#). Another issue that arises from use of e-mail is the blurring of the line between “correspondence” and “meetings.” The [Council](#)’s guide to *E-mail and Meetings under the Virginia Freedom of Information Act* provides guidance on this issue. An [appeal is pending](#) in the Supreme Court of Virginia.

#### **6.1.5 Who May Request Records: 24.2, FOIA, NVRA**

FOIA requests for state and local records can be made only by Virginia residents or media representatives with a connection to Virginia. Requests from non-Virginians or media representatives with no connection to Virginia can be denied.<sup>5</sup> However, these requests do not have to be denied unless access to that record is otherwise restricted. [§ 2.2-3704](#). Nor would the FOIA access limitation apply to requests under a different statute such as NVRA discussed later in more detail in reference to voter registration applications. Careful attention must be given to the particular terms of the statute providing access. For example, §24.2-706 restricts inspection of absentee ballot applications can only be inspected by a registered Virginia voter. Further, copies may not be provided and those used for inspection must have social security number and protected voter residence address redacted.

#### **6.1.6 Requests Need Not Be Written or Reference FOIA**

The request does not have to be in writing. If the request is made by mail, it will contain the requestor's name and address. If it is made in person, the office may require the requestor to provide his name and legal address. Nothing in FOIA defines the way in which the requestor must provide his name and legal address, either by stating it or in writing (such as signing a log book). If the request, name, and address are not provided in writing, write them down for the office's information and protection. [§ 2.2-3704](#) (A).

The request for records need not make reference to FOIA to invoke the requirements of the Act. If it is from a qualified requestor (a Virginia citizen or reporter, with both categories broadly interpreted), and is a request for a *document*, it should be considered a FOIA request. If it is a request for information, it may be treated as a FOIA request, particularly if documents in the office can be readily identified which contain that information.

A registrar is under no obligation to suggest possible alternative theories of access. For example, if a registrar receives a request for voter registration applications under FOIA

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<sup>5</sup> See *McBurney v. Young*, U.S. Sup. Ct. [Slip. Op. No. 12-17](#) (4/29/2013).

the registrar can deny the request citing §§ 2.2-3703(B), 24.2-101, 24.2-444(C). The requestor may present a new request under NVRA discussed below.

### **6.1.7 “Reasonable Specificity”**

The request should include enough information for the recipient to identify whether there are any records in the office (or the official's possession) that satisfy the request. If there is any question about what is being requested, call the requestor and discuss the matter to refine the request and response. Keep notes on these discussions and file them with the request in the office correspondence file in case there is ever any question about the request and response. [§ 2.2-3704](#).

For example, a requestor recently asked the State Board for "all the dead people on the books by locality" in Virginia. After discussing the matter with the requestor, he was provided with a copy of the most recent report showing the number of voters removed from the rolls as deceased, by locality, since the beginning of the year. The staff could have provided a literal response ("None, because they have been deleted if we knew they were dead"), which probably would have resulted in a second FOIA request, with different wording, and an aggravated citizen.

### **6.1.8 Response Timelines**

Election law provides a **three** working day response period for certain requests:

- Electoral board secretary responses to candidate and political party requests for officer of election lists with party designations
- State Board of Election responses to candidate and political party requests for instructions and other guidance to local electoral boards and general registrars<sup>6</sup>

Under FOIA, the general rule is that the public official or employee must deliver the requested records within five working days of receiving the FOIA request. FOIA provides exceptions to this rule that allow more time to deliver the records (see below). In all circumstances, the official or employee must respond to the FOIA request within five working days even if the records cannot be delivered within such time.

Pertinent parts of [§ 2.2-3704](#) are reproduced below:

- Any public body that is subject to ... [FOIA] and that is the custodian of the requested records shall promptly, but in all cases within five working days of receiving a request, provide the requested records to the requester or make one of the following responses in writing:

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<sup>6</sup> See GREB 4 and 28.

- The requested records are being entirely withheld because their release is prohibited by law or the custodian has exercised his discretion to withhold the records in accordance with ... [FOIA]. Such response shall identify with reasonable particularity the volume and subject matter of withheld records, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records.
- The requested records are being provided in part and are being withheld in part because the release of part of the records is prohibited by law or the custodian has exercised his discretion to withhold a portion of the records in accordance with ... [FOIA]. Such response shall identify with reasonable particularity the subject matter of withheld portions, and cite, as to each category of withheld records, the specific Code section that authorizes the withholding of the records. When a portion of a requested record is withheld, the public body may delete or excise only that portion of the record to which an exemption applies and shall release the remainder of the record.
- The requested records could not be found or do not exist. However, if the public body that received the request knows that another public body has the requested records, the response shall include contact information for the other public body.
- **It is not practically possible to provide the requested records or to determine whether they are available within the five-work-day period.** Such response shall specify the conditions that make a response impossible. If the response is made within *five* working days, the public body shall have an additional *seven* work days in which to provide one of the four preceding responses.
  - Any public body may petition the appropriate court for additional time to respond to a request for records when the request is for an extraordinary volume of records or requires an extraordinarily lengthy search, and a response by the public body within the time required by ... [FOIA] will prevent the public body from meeting its operational responsibilities. Before proceeding with the petition, however, the public body shall make reasonable efforts to reach an agreement with the requester concerning the production of the records requested.
  - Subject to the provisions of subsections G and J of [§ 2.2-3704](#) [concerning databases], no public body shall be required to create a new record if the record does not already exist. However, a public body may abstract or summarize information under such terms and conditions as agreed between the requester and the public body.

### 6.1.9 Charges

Reasonable charges not exceeding actual cost may be assessed for searching, accessing, supplying, and duplicating public records. Charges are prohibited for any extraneous, intermediary or surplus fees or expenses to recoup the general costs associated with creating or maintaining records or transacting the general business of the public body. Charges may include the time needed to access, find, copy, and mail/ship the documents, and the actual cost of the copies and the mailing/shipping.

When assessing a reasonable charge, best practice and public policy support the most cost effective method of producing the records. The costs of fringe benefits or other overhead expenses may not be added to the charged personnel costs. For more information about allowable costs under FOIA, see [\*Taking the Shock Out of Charges: A Guide to Allowable Charges for Record Production under the Freedom of Information Act\*](#) on the FOIA Council website.

- ❖ Example 1: If a clerical employee could complete the FOIA request in one hour, then the cost is one hour's wage for the clerical employee. Example 2: If a clerical employee would spend 20 hours to complete a FOIA request but the IT staff could complete the FOIA request in 20 minutes, the cost is the cheaper of the two options—regardless of which one is utilized.

If the FOIA request is a repeat of a previous FOIA request, charge the amount to reproduce the previous records not the amount charged for the previous request.

- ❖ A FOIA request is received that requires substantial work to collect, copy, and redact the records. Weeks later, an identical FOIA request is received by another person. If a copy of the previous FOIA request is still available, the office may only charge the amount necessary to create another copy—not the amount necessary to collect, copy, and redact the records again. If a copy of the previous FOIA request is not still available, the office may charge the amount necessary to collect, copy, and redact the records again.

If costs incurred in granting a FOIA request are expected to be above \$200, the requestor may be asked to pay in advance, and performing the request may be delayed until receipt of such advance payment.

For requests under \$200, the office may *not* require the requestor to pay the charges before turning over the requested documents. If any requestor does not pay in a reasonable time, report the bill to the office that handles normal debt collection for the local government. Before processing a request for records, a public body may require the requester to pay any amounts owed to the public body for previous requests for records that remain unpaid 30 days or more after billing.

If the citizen requests an advance estimate, all charges for supplying the requested records must be estimated in advance. [§ 2.2-3704](#).

### **6.1.10 FOIA Exclusions for Records (Personnel, Medical Records, Legal Advice, Et Cetera)**

There are over 90 separate FOIA records exclusions. [§§ 2.2-3705.1, 2.2-3705.7](#). These are records that may be withheld under FOIA, but may be provided at the option of the record custodian **unless access is otherwise restricted by law**. The Freedom of Information Advisory Council's guide includes an excellent summary and discussion about the records exemptions of general applicability, which includes most of the exemptions that might ever be needed by the SBE, an electoral board or a general registrar. See [Access to Public Records](#). A few are listed below.

#### **6.1.10.1 Exclusions to application of chapter; exclusions of general application to public bodies ([§ 2.2-3705.1](#))**

The following records are excluded from the provisions of this chapter [FOIA] but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law [the number corresponds to the exceptions prohibited by law - see code section]:

- (11) Communications and materials required to be kept confidential pursuant to § [2.2-4119](#) of the Virginia Administrative Dispute Resolution Act (§ [§ 2.2-4115](#) et seq.)

#### **6.1.10.2 Exclusions to application of chapter; records relating to administrative investigations ([§ 2.2-3705.3](#))**

The following records are excluded from the provisions of ... [FOIA] but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law [the number corresponds to the exclusions - see code section]:

- (8) Records of the Virginia Office for Protection and Advocacy consisting of documentary evidence received or maintained by the Office or its agents in connection with specific complaints or investigations, and records of communications between employees and agents of the Office and its clients or prospective clients concerning specific complaints, investigations or cases. Upon the conclusion of an investigation of a complaint, this exclusion shall no longer apply, but the Office may not at any time release the identity of any complainant or person with mental illness, mental retardation, developmental disabilities or other disability, unless (i) such complainant or person or his legal representative


consents in writing to such identification or (ii) such identification is required by court order.

- (9) Information furnished in confidence to the Department of Employment Dispute Resolution with respect to an investigation, consultation, or mediation under Chapter 10 ([§ 2.2-1000](#) et seq.) of this title, and memoranda, correspondence and other records resulting from any such investigation, consultation or mediation. However, nothing in this section shall prohibit the distribution of information taken from inactive reports in a form that does not reveal the identity of the parties involved or other persons supplying information.

#### **6.1.10.3 Exclusions to application of chapter; records of specific public bodies and certain other limited exemptions ([§ 2.2-3705.7](#))**

The following records are excluded from the provisions of ... [FOIA] but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law [the number corresponds to the exceptions prohibited by law - see code section]:

- (2) Working papers and correspondence of the Office of the Governor; Lieutenant Governor; the Attorney General; the members of the General Assembly (and legislative aides working on a member's behalf) or the Division of Legislative Services; the mayor or chief executive officer of any political subdivision of the Commonwealth; or the president or other chief executive officer of any public institution of higher education in Virginia. However, no record, which is otherwise open to inspection under this chapter [FOIA], shall be deemed exempt by virtue of the fact that it has been attached to or incorporated within any working paper or correspondence.

-  This exception does not extend to the State Board of Elections or Electoral Boards unless they are involved in preparing working papers for the named state and local officials. For example, bill drafts and analyses that SBE policy staff prepares for the governor can only be disclosed with the consent of the specific individual governor for whom they were prepared.

As used in this subdivision "Office of the Governor" means the Governor; his chief of staff, counsel, director of policy, Cabinet Secretaries, and the Director of the Virginia Liaison Office; and those individuals to whom the Governor has delegated his authority pursuant to [§ 2.2-104](#). "Working papers" means those records prepared by or for an above-named public official for his personal or deliberative use.

[2012 legislation](#) amending [§2.2-3705.7](#) adds a limited exclusion for certain contact information included in correspondence with a public body of locality unrelated to the transaction of public business--names, physical addresses, telephone numbers, and email addresses. It is important to remember election law may require disclosure of email address such as when included in an absentee ballot application or voter registration application submitted after 7/20/2011 requested under NVRA. If no election law requires

disclosure, this FOIA exemption may allow withholding email address provided for voting.

### **6.1.11 Exemptions must be Narrowly Construed**

Unless a public body, its officers or employees expressly invoke a specific exemption provided by FOIA or another statute, all public records made available for inspection and copying upon request. All public records are presumed open, unless an exemption is properly invoked. [§ 2.2-3700](#). FOIA is liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption from public access to records or meetings must be narrowly construed, and no record can be withheld unless specifically made exempt by FOIA or other specific law. [§ 2.2-3700](#).

### **6.1.12 Attempt To Reach Agreement with the Requestor**

FOIA is not intended to discourage free discussion by government officials or employees of public matters with the citizens of the Commonwealth. All public bodies and public officials should make *reasonable efforts* to reach an agreement with a requestor concerning the production of the records requested. [§ 2.2-3700](#). This may include discussions or correspondence with the requestor in order to ensure that the public body produces all pertinent public records requested. Also, such discussion can help clarify (and thereby narrow) a request that at first seems overwhelming. While FOIA is about records, not information, requestors appreciate assistance guiding them to the records that answer their questions. For example, after records have been transferred to the Library of Virginia, the Library is the custodian responsible for responding to a FOIA request. [§ 2.2-3704](#) (effective 7.1.2011).

### **6.1.13 No FOIA Rights for Inmates**

FOIA has a specific exclusion for persons incarcerated in state, local or federal correctional facilities. However, incarcerated persons may obtain records to exercise constitutionally protected rights, including, but not limited to, calling for evidence in his/her favor in a criminal prosecution. [§ 2.2-3705.7](#).

### **6.1.14 Criminal Information**

Virginia has closed criminal records. Any information the office receives regarding criminal records must be kept confidential. See [§§ 24.2-409](#) and [19.2-389](#). The Division of Central Criminal Records Exchange provides felony information to SBE only for the purposes of allowing registrars to cancel the registration of any voter known to be a convicted felon. [§§ 24.2-409](#) and [24.2-427](#). Requests for information regarding criminal records should be referred to the State Police. Information obtained through the VERIS on prohibited voters is *not* available through FOIA.

### **6.1.15 Enforcement**

In any action to enforce FOIA, the public body bears the burden of proof to establish an exemption by a preponderance of the evidence. Any failure by a public body to follow the procedures established by FOIA is presumed to be a violation. [§ 2.2-3713](#). At least three working days advance notice must be given before a court petition to enforce FOIA can be filed. [§ 2.2-3713](#).

### **6.1.16 Penalties**

In a proceeding against members of public bodies, the court, if it finds that a violation was willfully and knowingly made, shall impose upon such member in his individual capacity, whether a writ of mandamus or injunctive relief is awarded or not, a civil penalty of not less than \$500 nor more than \$2,000. For a second or subsequent violation, the civil penalty shall be not less than \$2,000 or more than \$5,000. [§ 2.2-3714](#) (effective 7.1.2011). Responsible officers and staff of the public body can be liable for civil penalties. The public body can also be required to pay the requestor's attorneys' fees.

Electoral board members, registrars, and their staffs should be aware that this applies to each person individually, and that a minimum \$500 fine may be applied for "willful" violations of FOIA requirements.

## **6.2 Records Retention Generally**

The Library of Virginia under the [Virginia Public Records Act](#) provides numerous schedules to assist state and local government agencies in maintaining and disposing of records in compliance with applicable legal requirements. The Library also has [Regulations](#) prescribing certain standards for public records, including requirements for secure disposal of records containing social security numbers. The [Library of Virginia Records Retention Schedule](#) GS-01 for Local Election Records was updated effective May 26, 2010.<sup>7</sup> The Retention Schedule for the State Board of Elections is available on SharePoint. To the extent any schedule conflicts with federal or state election law requirements; the statutory requirements must be followed.

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<sup>7</sup> The 2010 update to GS-01 makes significant revisions to reflect the 2007 implementation of VERIS; this schedule was revised in 2008 as to campaign finance records only.

## 6.3 Retention Schedules

"Public records" under the Virginia Public Records Act and Virginia Freedom of Information Act potentially includes all election or job-related records, including e-mails in the possession of the official or office. The Virginia Public Records Act directs the Library of Virginia to oversee retention and disposition of public records created by or used by state and local governments. For more information on the Library's public records services, see the [Library's website](#).

With this in mind, attention should be given to the retention schedules of records (as defined in the [Library of Virginia retention and disposition schedules](#)). After the retention period has passed, follow the appropriate archiving or destruction procedures. FOIA cannot require production of a record that no longer exists, or is no longer possessed.

If conversion from paper to another format (microfilm or electronic) has been authorized,<sup>8</sup> the original records can be destroyed after the new images have been verified. The information in the new format then becomes the copy of record (also known as the record or master copy) and must be retained for the length of time specified on the retention schedule.

### 6.3.1 Disposition

The nature and format of the information in the records determine the destruction method. When records contain personal, private or confidential information (such as voter records), it is critical that they are destroyed in a way that will prevent unauthorized access to the records or information. [§ 2.2-3801](#) (defining "personal information" for government record keeping purposes generally). Records containing social security numbers generally must be destroyed within six months after the expiration of the applicable retention period.<sup>9</sup> [§ 42.1-86.1](#). Secure destruction that meets standards detailed in [Library of Virginia Regulations](#) must be utilized:

- Electronic Data: Information in electronic media must be totally obliterated and rendered unusable, not merely deleted. Special software programs are available for this purpose. CDs and DVDs must be physically destroyed to render them inaccessible. Hard drives containing any data must be removed and destroyed separately before discarding any computers.
- Microfilm: Certain types of microfilm and microfiche can be shredded. Contact the Library of Virginia for assistance.

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<sup>8</sup> Virginia's Uniform Electronic Transactions Act in [§ 59.1-496](#) authorizes public bodies to adopt policies allowing electronic signature and submission of information. SBE may adopt policies or regulations in the future.

<sup>9</sup> The general requirements of the Public Records Acts are subject to a determination of overriding need by the appropriate agency head. [§ 42.1-87\(E\)](#).

- Shredding also must comply with the [Library of Virginia regulation standards](#). Shredding on site must use a mechanical cross cut device producing shreds no larger than 3/8 inch. Vendors must be bonded.
- Recycling is an acceptable method of destruction for records with no special disposition requirements. Consult locality for information on recycling programs.

Retention schedules and completed [Certificate of Records Disposal \(RM-3\)](#) forms serve as evidence of proper disposal if records are later requested under the Virginia Freedom of Information Act or subpoenaed as evidence. To destroy public records, the following steps document compliance with legal requirements:

- Refer to the Library of Virginia approved [Records Retention and Disposition Schedule](#).
- Ensure that the retention period stated on the schedule has passed.
- Ensure that all known audits, investigations or litigation are resolved.
- Complete a [Certificate of Records Disposal \(Form RM-3, 7/2008\)](#).
- Obtain signatures of the Records Officer and person requesting disposition of records. The Records Officer must approve all dispositions. (It is suggested that a specific member of the Registrar's staff work with the locality Records Officer when destroying records). These signatures constitute approval to destroy.
- Identify the person who can verify that the records were destroyed.
- Send **original** RM-3 form with signatures to the Library of Virginia. (This is usually done by the locality's Records Officer) Keep a copy of the form for the office files; retain according to [schedule GS-19 for localities](#).

Best practice: maintain a central "List of Files" in the office that describes the contents of various filing cabinets, etc. where records are stored for convenience in locating records. The Library of Virginia holds training seminars on records management throughout the state, and it is recommended that at least one member of the staff attend such training. Information on records retention and management is also available at the [Library of Virginia website](#).

## 6.4 Application Files

Registrars must keep all *submitted* voter registration application forms in an easily accessible container with a lock or in a locked room.

Registrars must keep *completed* voter registration application forms in an easily accessible container with a lock or in a locked room. Registrars may wish to keep these files separate as the retention period is different.

## 6.4.1 Computer and File Security

Voting records contain much private information that is protected by law. Furthermore, the administration of elections is vital to good government. The privacy of these records and the proper administration of elections can be destroyed by malicious individuals or accidental disclosure of information. In order to minimize the potential for accidental or malicious disclosure of data, local election officials are encouraged to follow VITA data security standards which can be accessed via the following links:

[IT Data Protection Guideline \(SEC507-00\)](#)

[IT Logical Access Control Guideline \(SEC509-00\)](#)

SBE Regulation [1 VAC 20-20-20](#) requires encryption or redaction before records containing sensitive personal information may be transmitted electronically by email or fax. Most email and faxes are not secure methods of transmitting information. SBE encourages working with the local IT department on security measures, including encryption technology to facilitate sharing information for official purposes.

Completed applications are not open to public inspection. [§ 24.2-444](#). On June 15, 2012, the United States Court of Appeals for Fourth Circuit held that NVRA requires making redacted voter registration applications available for inspection and copying at cost; specific instructions will be developed on remand to the district court, including the scope of redacting and federal law language requiring photocopying “where available ...at reasonable cost.” [42 USC 1973gg-6\(i\)\(1\)](#) and [24.2-444\(B\)](#). At a minimum, redaction of social security number and protected voter residence addresses is indicated; birth day and month may also be addressed in instructions developed in the district court. If a registered voter requests a copy of his own application, the registrar *must* provide it. [§ 2.2-3806](#). *See below*, Table titled “Summary of Records Access for Individuals and Criminal Investigations”. Registration records are maintained by the general registrar. [§ 24.2-444](#). *Only* lists of registered voters and persons denied registration, issued as reports from VERIS containing statutorily authorized information, are open to public inspection. All other voter registration records are specifically withheld from public inspection and/or copying, with the limited exception of certain records relating to list maintenance activities.<sup>10</sup> [§ 24.2-444](#). The general registrar is not required to provide copies of the authorized lists to the public. [§ 24.2-444](#). Therefore, the registrar may decline to provide copies of voter registration lists required only to be available for public inspection.<sup>11</sup> Copies of registered voter lists may be available from the State Board of Elections to purchasers authorized in [§ 24.2-405](#). *See below*, “Records Access Index”.

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<sup>10</sup> These records are described in [§ 24.2-444](#) (B). General registrars must retain and make these records available for public inspection and copying for at least two years.

<sup>11</sup> When access to a record is limited to certain individuals, a provision for inspection does not authorize copying. *Op. Va. Att’y Gen.* 08-041 (interpreting [§ 16.1-305](#)).

**Table: Summary of Records Access for Individuals and Criminal Investigations**

<b>Item</b>	<b>Accused and Accused's Counsel</b>	<b>Commonwealth's attorney</b>	<b>Third party (e.g., lawyer for another person)</b>
Voter registration application	In full.	In full. <a href="#">§ 24.2-1019</a> .	Not at all. Inspect public list only. <a href="#">§ 24.2-444</a> .
List of those who voted	Extract limited to accused or other representative (e.g., certification as to content)	No restriction. <a href="#">§ 24.2-1019</a> .	Not at all. Only from SBE under <a href="#">§ 24.2-406</a> .
Poll book indicating person voted	Extract limited to accused or other representative (e.g., certification as to content)	No restriction. <a href="#">§ 24.2-1019</a> .	Not at all. Only from SBE under <a href="#">§ 24.2-406</a> .

#### **6.4.2 Alphabetical File for Current Registrants**

This file contains the application cards of current registrants, both active and inactive. Documents are filed in alphabetical order by last name. The registrar maintains this file indefinitely so long as the individual is registered in the locality. [GS-01, Series 006095](#).

#### **6.4.3 Denials, Changes, and Cancellations**

The registrar must enter information from all denied applications, cancellations, changes and re-registrations into VERIS. The registrar checks the data against the E & V report then files the card in the appropriate file and then retains the record for period required in [§ 24.2-114](#)(8).<sup>12</sup>

VERIS enables registrars to search these records and provide federally mandated statistical reports. Registrars do not need to enter separate statistics for denials and duplicates on a daily, weekly, or monthly basis.

#### **6.4.4 Suspense File**

The suspense file organizes all voter application cards from time of receipt until the registrar verifies applications that have been entered into VERIS on the *Errors and Validation Report* (E&V report). Applications are removed and re-filed after the accuracy of the VERIS entries is verified. The file is divided into seven sections:

- Adds/changes
- Cancelled

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<sup>12</sup> Some GRs file changes such as name and address by date, rather than by the affected voter; filing by affected voter assures compliance with the full retention period prescribed in [§ 24.2-114](#)(8).

- Denied
- Pending
- Confirmation Notice Requested
- VERIS Applications Sent to Other Localities

Documents are to be filed in alphabetical order within each section.

All voter registration applications received and awaiting action are filed in the pending file. The registrar enters the information in VERIS, then places the application in the appropriate add, delete, denied, or change file until it can be verified in the E & V report.

When a registrar receives a signed but incomplete application from a voter registered in another locality indicating a change of address, the registrar must request the voter's original alpha card from the voter's previous locality. The sending locality takes the following steps:

- Photocopies (or scans) the alpha card
- Notates on the copy the date and name of the gaining locality "transferred out to (Gaining Locality)"
- Files the notated copy in the "Applications Sent to Other Localities" suspense file

When the sending locality has verified that the transfer out record appears on the E & V report, the sending locality may destroy its reference copy of the alpha card. Reference copies are not public records but must be securely destroyed to protect confidential personal information. [§ 42.1-77.](#)

## **6.5 Errors and Validation Report (E&V Report)**

The Errors and Validation Report (E&V report) serves as an audit for all updated transactions entered into VERIS. A record will print on the report for all updated registrations. The report provides a record for each transaction, whether accepted, canceled, or rejected. Each record will contain data as it was entered into the system. To ensure an accurate database, the registrar must compare the source of the data to the report and correct any errors. This process ensures the accuracy and integrity of all data and other reports produced by VERIS.

### **6.5.1 Precinct Record Listing**

The "Precinct Record Listing" is produced for public inspection purposes and therefore contains no social security numbers or day/month of birth information. It lists all registered voters in alphabetical order within each precinct.

- ❖ The Code of Virginia requires that the registered voter lists produced by VERIS be open simply to *public inspection* (but does not require copying). FOIA is

limited to citizens of the Commonwealth and certain news media organizations but is not a basis for restricting access to voter lists and records that Title 24.2 and federal law make available for public inspection. [§ 2.2-3703](#) (Title 24.2 controls in event of conflict); [U.S. Const. Art. VI, para. 2](#).

## **6.5.2 Precinct Record Updates**

The “Precinct Record Updates” includes, in alphabetical order by precinct, the complete record for each registrant whose record was added, changed, or deleted during the time period of the update. A message indicating the date and type of transaction will appear with each record.

VERIS now manages the process for updating registrant files and generating lists of registered voters. The registrar is responsible for destroying obsolete lists and supplements upon creating a new complete list. [§ 24.2-444](#).

SBE may provide the Precinct Record Updates electronically through VERIS in whole or in part in response to a request for public inspection. A general registrar may but is not required to provide an electronic copy of a list required to be available for in office public inspection.

## **6.5.3 Denied Registrations Report**

A list of all persons denied registration must be available for public inspection in the office of the general registrar. [§ 24.2-444](#). This report can be scheduled to run at a specific time through VERIS or can be requested ad hoc to supply information for a specified time period. The list need only contain the information corresponding to the registered voter lists (name, address, birth year, gender, applicable election districts). [§ 24.2-444](#). FOIA allows additional personal information to be disclosed within the discretion of the record holder if not otherwise prohibited by law. [§ 2.2- 3705.1](#). For example, the reason for denying an application may be confidential if based on criminal records. [§ 19.2-389](#).

## **6.6 Monthly Transactions Summary**

This one-page summary reports all transactions entered in VERIS by your locality during the month covered. It is a valuable planning tool and will provide concrete proof of workload as justification for your budget requests.

This VERIS report is available electronically. You may keep printed copies as long as administratively necessary then destroy in compliance with the policies detailed in GS-01, page 1. See, [GS-01, Series 000514](#).

## 6.7 Protection of Social Security Numbers

Election law authorizes collection of social security numbers for certain purposes, including voter registration and provisional voting, but strictly prohibits release of social security number information without specific authorization. §§ [24.2-407.1](#), [24.2-416.5](#). Unauthorized release of a voter or registration applicant social security number or a part thereof is a felony. § [24.2-1002.1](#). If the SSN (or part) appears on a record or list open for inspection or copying, the number must be covered so it cannot be read. Marking out the SSN may not be sufficient protection when copying records as the numbers may still be visible after copying. To ensure complete protection of SSN, cover the information and check the copy prior to releasing to someone other than the voter or applicant, their authorized representative or a Commonwealth's Attorney investigating an election offense. *See above*, [GREB 6.3.1](#) "Table". Voter registration applications containing the SSN cannot be made available except to the applicant, his authorized representative<sup>13</sup>, or a Commonwealth's Attorney. §§ [2.2-3806](#), [24.2-1019](#). In any other circumstance, a court order may be necessary and local government legal counsel should be consulted. Effective 7/1/2010, state and local governments are prohibited from collecting social security numbers without statutory authorization. § [2.2-3808](#).

### 6.7.1 Persons Authorized to Receive/Use Lists from SBE

The SBE is required to furnish, "at a reasonable price," lists of registered voters and persons voting in elections to certain authorized individuals and organizations for strictly limited purposes. §§ [24.2-405](#) - [24.2-407.1](#). 2012 legislation expands eligibility for lists with voter history under § [24.2-406](#) to include individuals and nonprofit organizations making communications to promote voter participation or registration without intimidation or pressure on the recipient. The legislation responds to a Virginia circuit court decision holding Virginia cannot limit these lists to only candidates, elected incumbents, political party chairs and another state's Chief Election Officer.<sup>14</sup> Lists cannot be provided to any person or for any purpose not authorized by statute.

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<sup>13</sup> The law does not define what constitutes "proper identification" for an authorized representative to receive personal information from government records. The general registrar must make a determination based on the facts of each request. Greater caution is indicated when dealing with persons over the telephone. The Commonwealth's attorney or local government counsel may be able to provide assistance with verifying authority and secure transmission. *See also*, [Virginia Notary Handbook](#) (pdf pp. 5 and 13) (satisfactory evidence of identity for notary purposes).

<sup>14</sup> *The KnowCampaign v. Rodrigues*, CL10-3425 (12/21/2010).

## 6.8 Index

**Records Access, Copying and Retention Index** (generally may not contain SSN, birth day and month, protected voter residence address; Code exceptions for law enforcement and voter or verified representative)

	<b>Record</b>	<b>Inspect</b>	<b>Copy</b>	<b>SBE</b>	<b>Retain</b>
1.	Voter registration application	Commonwealth attorney, applicant or applicant's authorized representative	Commonwealth attorney, applicant or applicant's authorized representative	GR is custodian	4 years after cancelled
2.	Voter registration application redacted	General public	Where available, may charge reasonable cost	GR is custodian	2 years
3.	List of registered voters	General public only in form of precinct record listing.	No. May provide copy for cost.	state chief voting officials, courts for jury selection, candidates, party committees, incumbents, registered PACs, qualified nonprofits	Until replaced by new list.
4.	Precinct Record Listing	General public	No. May provide copy for cost.	See above.	Until replaced by new list.
5.	Denied registration list	General public without reason	No. May provide copy for cost.		Until replaced by new list. Denied applications retained 4 yrs. but are not available. See above.
6.	Cancelled list (felony, adjudication, confirmed move, declared noncitizen)	General public without reason	For cost.		4 years
7.	Confirmation list and responses	Public	Public for cost.		2 years
8.	List of Those Who Voted See Section 6.8.1.	See SBE	See SBE.	Qualified individual or organization, candidates,	Not required. SBE maintains.

	<b>Record</b>	<b>Inspect</b>	<b>Copy</b>	<b>SBE</b>	<b>Retain</b>
				elected incumbents, party chairs for political purposes, another state Chief Election officer	
9.	Pollbooks	Same as above	Same as above	Same as above	2 years.
10.	Absentee ballot applications	Virginia registered voter (unless also for registration)	No effective 7.1.2010.	GR then Circuit Court	2 years (or as voter registration)
11.	Absentee applicant list	Virginia registered voter	Virginia registered voter. May charge reasonable cost.	Electronically to requesting party or candidate.	2 years
12.	Final absentee applicant list	Public	No. May provide for cost.	GR then Circuit Court	2 years
13.	Campaign Finance reports	Public	Yes	Yes	1 year after final report or through next general election for pertinent office.
14.	Petitions	Public except any SSN or part must be redacted.	No. May provide for cost.	If filed with SBE.	5 years or through the next general election for that office, whichever is later
15.	Candidate statement of economic interest form	Public except any SSN or part must be redacted	For cost.	If filed with SBE.	5 years or through the next general election for that office, whichever is later.
16.	List of officers of election with party designations.	Public except personal information may be withheld. Only parties and candidates can access party designation.	EB Secretary must provide to requesting candidates and parties for cost.	If filed with SBE or available in VERIS.	Until superseded.

Supporting citations:

1. Va. Code 2.2-3806, 24.2-101, 24.2-114(8), 24.2-444, 24.2-1019, application form
2. Va. Code 24.2-444
3. Va. Code 24.2-444
4. Va. Code 24.2-444
5. Va. Code 24.2-114(8), 24.2-444(B), 42 USC 1973gg-6
6. Va. Code 24.2-114(8), 24.2-444(B), 42 USC 1973gg-6
7. Va. Code 24.2-101, 24.2-406, 24.2-407, 24.2-444. See also 2.2-3703(B), 2.2-3705.1(10) and 2.2-3801
8. Va. Code 24.2-114(11), 24.2-668 and above.
9. Va. Code 24.2-706, 42 USC 1974
10. Va. Code 24.2-706, 42 USC 1974
11. Va. Code 24.2-710
12. Va. Code 24.2-946.2
13. Va. Code 24.2-107. GS-01, Series 000509
14. Va. Code 2.2-3114, 2.2-3115. GS-01, Series 000509
15. Va. Code 24.2-115.

### **Guidelines for Responding to Request for Copies of Voter Registration Applications Received on or After July 20, 2011, under the National Voter Registration Act (NVRA)**

The recent *Project Vote* litigation involving the disclosure requirements of the NVRA provides access to individual voter registration applications, excluding the applicant's social security number and the residence street address of any individual that provides a post office box address in lieu of his street address pursuant to § 24.2-418(B) of the Va. Code. NVRA, 42 USC [§1973gg-6\(i\)](#), does not specify a deadline or procedures for responding:

#### **(i) Public disclosure of voter registration activities**

(1) Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.

(2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) of this section are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

As directed by the *Project Vote* consent decree, SBE provides these procedures to assure compliance with the NVRA in a timely fashion. SBE suggests posting the following notice about your requirements for voter registration records requests under the NVRA:

### **National Voter Registration Act Requests**

Under the National Voter Registration Act (NVRA), a federal law, you may request access to voter registration applications held by this office submitted since July 20, 2011. Social security numbers and residence street addresses of any individual that provides a post office box address in lieu of his street address pursuant to § 24.2-418(B) of the Va. Code must be redacted. The request must include your name and sufficient information for us to contact you, and must reasonably describe the records you are requesting. We will respond to your request within twenty (20) working days.

If we determine an exemption authorizes withholding information in addition to social security number and residence street address of any individual that provides a post office box address in lieu of his street address pursuant to § 24.2-418(B), the response you receive will:

- indicate the authority supporting the exemption claimed
- describe what the exemption(s) cover
- explain the procedures for appealing the denial to the electoral board

Before submitting a request, check with the General Registrar to see if the public lists of registered voters and denied applications might provide the information you need. We charge \$.20 per page for copying applications. An additional redacting charge of \$.05 per page may apply. Payment is required before copies will be provided. If charges are estimated to exceed \$250.00, or you have other unpaid charges, we may require payment in advance before proceeding.

Please submit requests by mail, fax or e-mail to:

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In addition to the above notice, we recommend the following guidelines for responding to requests for voter registration applications under the NVRA:

1. NVRA requests should be acknowledged within 10 working days with an estimate of the cost for responding. Costs estimated to exceed \$250 may be required to be paid in advance before proceeding.
2. Within 10 working days after acknowledging the request, copies of requested applications held by your office that were submitted on or after July 20, 2011, should be provided with social security number and, where applicable, the residence street address of any individual that provides a post office box address in lieu of his street address under § 24.2-418(B) redacted. The time involved to redact may be charged to the first request for which the redacted copies are prepared.
3. If a request involves an extraordinary volume or lengthy search, you should make reasonable efforts to reach an agreement with the requester concerning the production of the applications requested. Additionally, you should consult your local government attorney or Commonwealth's attorney if you are unable to reach an agreement to prepare for possible enforcement action under NVRA. No prior notice is required to bring suit for alleged violations within 30 days of a federal election. See [42 USC§1973gg-9](#).